

Californians for Renewable Energy, Inc.(CARE)

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STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:

Application for Certification for the
Metcalf Energy Center [Calpine
Corporation and Bechtel Enterprises, Inc.]

) Docket No. 99-AFC-3

)

) **Motion to call hearing**
) **on the public participation**
) **process pursuant to CEQA**

)

Intervenor CARE moves that the California Energy Commission (CEC) hold a hearing in regards to the Metcalf Energy Center's siting and the public participation process visa vi the requirements of the California Environmental Quality (CEQA), and the Warren Alquist Act. The purpose of the hearing being to resolve "an irreconcilable conflict" between CEQA and the Warren-Alquist Act in regards to the public participation process.

The CEC process is a long way from providing CEQA equivalency in any sense of that requirement, particularly in regard to public participation, and there appears to be "an irreconcilable conflict" between CEQA and the Warren-Alquist Act on this and other points, including absolutely vital elements of an adequate CEQA review. (See *Mt. Lion*, 16 Cal.4th 105, 114 (claim of "irreconcilable conflict" between CEQA and California Endangered Species Act).)

The CEC process as presently carried out is tainted with gross unfairness, inequity and inherently fraudulent goals. For example, CEC staff should indicate as precisely as possible how long the applicant will be given to provide the additional information requested in the PSA, and how long the applicant will be allowed to

continue dribbling out the requested information on an irregular, piecemeal basis, particularly in regard to critical biological and water resources, which is very frustrating to and time consuming for the experts we have already retained, and which greatly interferes with if not completely precludes public participation. As evidence of this we cite CEC staff's August 16, 2000 status report wherein it states:

“As was agreed to during the workshops, Calpine/Bechtel has provided much of the additional information that was requested. However, several critical pieces of information remain outstanding. The following information is needed prior to completing the FSA:

- ❑ Water resources and impacts to ground water;
- ❑ Cultural resource surveys near the water wells and supply lines;
- ❑ Biological resources;
- ❑ PM10 mitigation package; and
- ❑ Partial load emission/emission factors (for air quality and public health)”

Of course, part of the frustration stems from the fact that the PSA applies environmental (particularly the analysis of immediate and long-term, as well as individual and cumulative, impacts on air, water and biological resources), engineering and public health/safety analyses to 19 technical areas.¹ (05/15/99 PSA, p. 1; see also incredibly long list of project components at pp. 1-2 of the PSA.)

The way the partnership of multi-national corporations constituting the applicant is being allowed to piecemeal the process is analogous to the strongly forbidden “chopping up [of] a proposed project into bite-size pieces which,

¹ In terms of the cost of public participation, the scope of the CEC review is simply overwhelming to a citizens group that must rely on public donations to retain the experts to properly participate. To a multi-national corporation such as Calpine or Bechtel, on the other hand, the expense is merely a tax-deductible cost of doing business that probably doesn't even make a noticeable dent to corporate coffers.

individually considered, might be found to have no significance on the environment.” (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 716, citing *Orinda Assn. v. Board of Supervisors* (1986) 182 Cal.App.3d 1145, 1171, 1172; see also *Bozung v. LAFCO* (1975) 13 Cal.3d at 283-284; *Sundstrom*, 202 Cal.App.3d 296, 309.) In the present case what we have is a chopping up of the CEQA duty to provide requested information into bite-size pieces that trivialize the nature and extent of project impacts. In addition, the piecemealing requires that intervenors respond, and allows the applicant to then reply, without requiring a comprehensive analysis, and without providing structure or finality to the process. And when the process gets near the end, strict time lines are imposed which create additional burdens on intervenors and other members of the public, further hindering if not completely preventing their full and meaningful participation in a process heavily weighed in favor of an applicant with virtually unlimited resources whose only excuse for piecemealing the required information is to use it as a tactic to avoid or minimize opposition. This is accompanied by the CEC’s well-publicized emphasis on the policy of expediting the siting and approval of powerplant projects.

This is a recipe for ecological disaster being carried out without adequate legislative knowledge or approval. In other words, if the goal is to fully exempt the powerplant siting process from CEQA--meaning that crisis conditions are so bad we should blindly sacrifice irreplaceable environmental resources for the unproven benefits of creating new, unregulated energy markets--this policy decision should be made by the Legislature. The Legislature can make the policy decision by simply making powerplant siting and licensing projects exempt from CEQA review, as the Legislature has the power to do (*Napa Valley Wine Train, Inc. v. Public Utilities Commission* (1990) 50 Cal.3d 370, 376; *Sagas v. McCarthy* (1986) 176 Cal.App.3d 288, 299), and as the Legislature has done for a multitude of specific types of project. (See, generally, CEQA §§ 21080(b), 21080.01 - 21080.08, 21080.7 - 21080.33.) Indeed, to accomplish the goal of fully exempting the powerplant siting process from CEQA review, all the Legislature needs to do is amend and expand an

existing, partial statutory exemption specifically granted to public agencies (e.g., the CEC) for specified actions on projects “relating to any thermal powerplant site or facility ...” (CEQA § 21080(b)(6).)

Providing a full CEQA exemption through the legislative process, rather than in the underhanded manner presently being allowed by the CEC process, would enable the citizens of this state to have a voice in the matter. It would also allow a full investigation and discussion of such relevant factors as the actual existence, nature and extent of the so called energy crisis which purportedly compels the blind destruction of irreplaceable ecological resources, as well as other related topics such as revisiting the decision to completely deregulate the electric power production market and leave vital policy decisions in the hands of politically insulated state agencies and the multi-national corporations seeking to profit from the situation.

In addition to greatly increasing our cost of public participation, the existing CEC process, which, among other things (without limitation), includes piecemealing the public disclosure of information vital to an adequate CEQA review, also makes it extremely difficult if not virtually impossible to intelligently determine if and when to retain additional experts to continue participating in the ongoing review process in a knowing and meaningful manner. As it stands, this is a clear violation of the strong CEQA right of public participation which will undoubtedly continue, and most probably get worse, unless immediate steps are taken to rectify it--assuming, of course, that such steps are feasible.

To a great if not complete extent it may already be too late to cure this public participation defect. But in the spirit of good faith and reasonableness fostered by the two apparently incompatible statutory schemes, CARE is perfectly willing to participate in a fair process--call it a “workshop” or “hearing” or whatever else the CEC may wish to label it--to deal with this problem before--not after--the MEC project

is approved. We respectfully demand that appropriate changes be made to rectify this defect or, in the alternative, that the CEC prepare an ordinary EIR pursuant to CEQA. Of course, the CEC's failure to accept our offer and properly address our public participation concerns--which include but certainly are not limited to the issues we've discussed thus far--will undoubtedly be raised as an issue in any ensuing judicial litigation.

A handwritten signature in black ink that reads "Michael E. Boyd". The signature is written in a cursive, flowing style.

Michael E. Boyd – President, CARE